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SUSPENSE

Date

Remarks

Executive Secretary

19 Dec 85

Date

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# CABINET AFFAIRS STAFFING MEMORANDUM

85-4283

Cabinet Room -- 2:00 P.M.

FILE: 100-2-6

There will be a joint DPC/EPC meeting with the President on Thursday, December 19, 1985, at 2:00 P.M. in the Cabinet Room.

**RETURN TO:**

- ☐ **Alfred H. Kingon**  
**Cabinet Secretary**  
**456-2823**  
**(Ground Floor, West Wing)**
- ☐ **Don Clarey**  
☐ **Rick Davis**  
☐ **Ed Stucky**

THE WHITE HOUSE

WASHINGTON

December 17, 1985

MEMORANDUM FOR DOMESTIC POLICY COUNCIL  
ECONOMIC POLICY COUNCIL

FROM: RALPH BLEDSOE, Executive Secretary, DPC *Ralph Bledsoe*  
EUGENE McALLISTER, Executive Secretary, EPC *EM*

SUBJECT: Joint DPC/EPC Meeting of December 19, 1985

Enclosed are an agenda and materials for the joint meeting of the Domestic Policy Council and the Economic Policy Council, now scheduled for Thursday, December 19, 1985 with the President at 2:00 p.m. in the Cabinet Room.

The first agenda item will include discussion of the Antitrust Legislation Review conducted by the joint working group on this subject. This issue was discussed at joint DPC/EPC meetings on November 20 and December 3, 1985. At those meetings the Councils recommended proposing to the President that the Administration seek special detrebling legislation; that we pursue alteration of current merger law; that the Administration propose antitrust exemptions for mergers and acquisitions in industries injured by imports as alternative relief under Sections 201-203 of the Trade Act of 1974; that the Administration propose amendments to Section 8 of the Clayton Act to exempt certain "safe harbor" de minimis interlocks between competitors; and that we seek to refine antitrust laws by clarifying the factors courts should use in deciding whether to exercise jurisdiction in antitrust cases involving foreign commerce. The enclosed decision memorandum contains additional information about these proposals.

The second agenda item will include discussion of a Domestic Policy Council issue - the Acquired Immunity Deficiency System (AIDS). The DPC Health Policy Working Group will report on Federal actions taken and proposed. In addition, the working group will describe conclusions and recommendations on how to fight this national health epidemic. A paper from the working group is enclosed.

**THE WHITE HOUSE**

WASHINGTON

**DOMESTIC AND ECONOMIC POLICY COUNCILS**

**Thursday, December 19, 1985**

**2:00 p.m.**

**Cabinet Room**

**AGENDA**

1. Antitrust Review
2. Acquired Immune Deficiency Syndrome (AIDS)

THE WHITE HOUSE

WASHINGTON

December 16, 1985

MEMORANDUM FOR THE PRESIDENT

FROM: THE DOMESTIC POLICY COUNCIL  
THE ECONOMIC POLICY COUNCIL

SUBJECT: Antitrust Review

Since the enactment of our major antitrust laws, the Sherman Act of 1890 and the Clayton Act of 1914, the world has changed considerably. Early in this century the "global economy" was unheard of. Today, the global economy is a reality, a reality to which U.S. business and the U.S. Government must adjust. That adjustment should include refining our antitrust laws to reflect the dynamics of world trade.

The Domestic and Economic Policy Councils have reviewed our antitrust laws, seeking to refine and adjust those laws not only to the integrated world economy, but also to reflect the increasing economic and legal sophistication regarding mergers and antitrust restrictions. This memorandum outlines for you several recommendations that the Councils believe will enhance the vigor and competitiveness of American businesses, while continuing to protect American consumers and businesses from unfair practices, including monopolies, cartels, and price fixing.

ECONOMICS AND ANTITRUST

The economic thinking that dominated antitrust legislation and enforcement through much of this century was that "big is bad." Any action toward greater concentration within an industry was attacked as a threat to competition and free trade.

Over the past decade, thinking has changed. Europe and Japan, with our help, have gained a formidable share of the world market and foreign competitors have made substantial inroads into the U.S. domestic market. In part because of increased diversity and heightened competition in global markets, economic thinking about the potential effects of mergers and other efforts by American firms to achieve greater efficiency has become more sophisticated: big is no longer viewed as necessarily bad and most mergers are supported as pro-competitive, helping businesses to achieve greater efficiency and consumers to enjoy lower prices.

Two of your appointments to Federal appellate Courts, Judges Robert H. Bork and Richard A. Posner, have pioneered a trend toward taking economic factors into greater account in antitrust

cases. This thinking improves upon the early 20th century antitrust philosophy by encouraging pro-competitive mergers and cooperative business arrangements, while continuing to guard against anti-competitive abuses that harm consumers and business alike.

Your Administration has captured the increasingly sophisticated economic thinking in the Justice Department's Merger Guidelines, which serve as a guide to Federal antitrust enforcement for the courts and the private sector. The Justice Department also has sought to promote an economically rational approach to antitrust by reforming government case selection criteria, filing briefs in private lawsuits, and issuing public pronouncements.

#### PROBLEMS IN ANTITRUST

Even with these significant advances in antitrust policy, more remains to be done.

- o Our antitrust statutes, as opposed to enforcement policies, have not been reformed to reflect changes over the years in antitrust thinking. Current policies and judicial trends could be reversed by the discretionary action of future administrations.
- o Current remedies for injuries in antitrust cases provide automatic damages that are three times the amount of the injury. These treble damage provisions were written into the law to deter anticompetitive behavior and encourage private vigilance against harmful cartel agreements, which are typically reached by competitors acting in secret. However, automatic treble damages also encourage frivolous law suits and unjustified settlements.
- o The antitrust statutes occasionally pose a disincentive to firms contemplating mergers to improve their competitiveness. The test applied to mergers, while made much clearer under the Merger Guidelines, still remains uncertain and poses a barrier to some firms. Moreover, the Guidelines do not prevent private parties from suing to prevent mergers.

#### RECOMMENDATIONS

The Domestic and Economic Policy Councils have developed a series of recommendations for refining the antitrust laws by:

- o Detrebling antitrust damages, except in cases of overcharges or underpayments and otherwise "fine-tuning" the antitrust remedies;
- o Amending the Clayton Act to strengthen and clarify the wording of the statutory standard for mergers and codify the principles embodied in the Justice Department's Merger Guidelines;

- o Establishing a limited antitrust merger exemption as an alternative remedy under Sections 201-203 of the Trade Act of 1974 for domestic industries injured by imports;
- o Lifting unnecessary restrictions on interlocking corporate directorates; and
- o Clarifying the factors courts should use in deciding whether to exercise jurisdiction in antitrust cases involving foreign commerce.

#### Detrebling and other Remedies Improvements

As mentioned earlier, treble damages can have positive effects in deterring and apprehending violators of our antitrust laws. However, trebling can also have serious anticompetitive side effects. Firms may shy away from practices such as aggressively lowering prices or innovative distributional practices because of the fear of treble damages. In addition, businesses may use the threat of treble damages to inhibit their more successful rivals.

The practice of awarding treble damages poses additional problems. Because each defendant is jointly and severally responsible for all defendants' damages, there is a strong incentive for defendants to settle rather than defend their actions, for fear that their co-defendants will settle first, leaving them with a disproportionate share of the damages should they be found liable.

In addition, successful plaintiffs in antitrust cases are awarded attorneys' fees, which encourages antitrust suits. Successful defendants, however, do not receive attorneys' fees. This imbalance creates incentives for antitrust litigation and an incentive to settle, sometimes without regard to the merits of the case.

The Domestic and Economic Policy Councils offer three proposals for refining the application of treble damages:

1. Treble damages should only be awarded in cases involving overcharges or underpayments;
2. The plaintiff's claim for damages in an antitrust suit should be reduced by the share of damages fairly allocable to any person released from liability; and
3. Attorneys' fees should be awarded to successful defendants in cases that are judged to be "frivolous, unreasonable, without foundation, or in bad faith."

#### Mergers and Acquisitions

The Councils also propose to clarify and improve the antitrust statutes by amending the Clayton Act to:



1. Strengthen the language of the statutory standard governing mergers to require a "significant probability" of harm rather than continue to test mergers under the current "may tend to" (or incipency) formulation;
2. Clarify that the harm to be avoided is increases in prices to consumers; and
3. Codify the principles of the Justice Department's Merger Guidelines.

### Import Relief

Sections 201-203 of the Trade Act of 1974 authorize the President to provide a domestic industry relief from foreign imports if the International Trade Commission (ITC) finds that an increase in imports is the substantial cause of actual or threatened injury to the domestic industry. Current relief measures include: tariffs, duties, quotas, and orderly marketing arrangements.

The Councils propose that the list of relief measures be expanded to include a partial antitrust exemption for mergers and acquisition in domestic industries injured by imports. The exemption would be for a limited period of time, up to five years.

The Councils believe there are two reasons for including the antitrust exemption in the range of relief options: (1) in the face of foreign competition significant enough to cause an injury finding under Section 201, the threat of collusion among domestic firms resulting from a merger is sufficiently small to justify a more liberal standard; and (2) the antitrust exemption would be a non protectionist alternative to the other possible relief measures.

### Interlocking Directorates

Section 8 of the Clayton Act prohibits a person from serving on the board of one or more corporations competing with another, however remotely. This absolute restriction causes much frustration as potential directors of diversified companies are repeatedly disqualified as directors after discovery of insignificant competitive overlaps.

The Councils propose to amend Section 8 of the Clayton Act to exempt interlocks where competitive overlaps are de minimus as measured by sales of the same product or sales in the same market. The Councils also propose to raise the threshold for Federal law prohibition of interlock from situations where either company has \$1 million in equity to situations where both companies have at least \$10 million in equity. These proposals would remove an unwarranted and bothersome restriction and provide greater certainty with regard to permissible corporate directors.

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Jurisdiction in Foreign Commerce Cases

Our trading partners and allies have expressed some consternation at the application of the Sherman Act to the international arena. They believe that this application of our antitrust law interferes with their domestic policies and objectives and represents an unwarranted intrusion upon their sovereignty. The United States has reserved the option to exercise jurisdiction over some international conduct because of its effect on our commerce.

The Councils propose that our antitrust laws be amended to require courts to dismiss private suits when, in light of specified factors, the exercise of jurisdiction would be unreasonable. Some of the factors to be considered would include: the nationality of the parties involved; the significance of the alleged violation to U.S. consumers and competitors; the presence of an intention to harm U.S. consumers and competitors; and the degree of conflict between U.S. and foreign law.

LEGISLATION OUTLOOK

The Councils unanimously agreed upon each of these proposals. We believe they are reasonable and important advances in antitrust law and enforcement.

We must caution that some of these proposals may arouse significant opposition and, in fact, spawn counter-proposals inconsistent with your Administration's policies. Nevertheless, we can also expect substantial support for some if not all of these proposals.

RECOMMENDATION

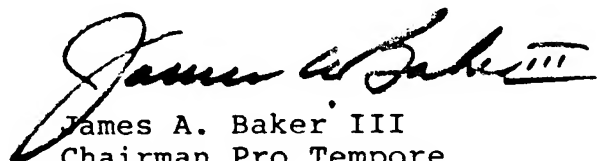
The Domestic and Economic Policy Councils unanimously recommend that the Administration forward legislation incorporating all of the proposed changes in antitrust law.

Approve \_\_\_\_\_

Disapprove \_\_\_\_\_



Edwin Meese III  
Chairman Pro Tempore  
Domestic Policy Council



James A. Baker III  
Chairman Pro Tempore  
Economic Policy Council

THE WHITE HOUSE

WASHINGTON

December 16, 1985

MEMORANDUM FOR THE DOMESTIC POLICY COUNCIL

FROM: THE WORKING GROUP ON HEALTH POLICY

ISSUES: What should the federal government do to deal with the problem of AIDS?

Background

Acquired immune deficiency syndrome (AIDS) is a very serious, apparently always fatal disease caused by a virus. The incidence of AIDS cases is increasing steadily in the United States. More than 15,000 persons have been diagnosed with the disease since 1981, and more than half of them have died. A much larger number of persons is known to be infected with the virus. The incubation period, during which a person is infected but does not have obvious disease, may last for several years. Infected persons may be capable of transmitting infection to others for many years, even though they may be free of symptoms. Virus infection is known to be transmitted through sexual contact, through equipment used to administer intravenous drugs of abuse, through contaminated blood or blood products and from infected mothers to infants. No effective vaccine or therapy exists.

AIDS raises a variety of policy issues for the federal government. The Domestic Policy Council should discuss possible recommendations to the President on these issues.

AIDS Research

Since the first description of this disease in 1981, a substantial amount of research has been done on AIDS, largely funded by the federal government. More than half a billion dollars will have been spent on AIDS research through this fiscal year. In addition, many other kinds of biomedical research are having beneficial spill-over effects on AIDS.

The AIDS virus has been identified and is being studied intensively. Since the virus is present in body fluids, the exchange of such fluids, especially blood and semen, spreads the infection. Current evidence indicates that only a fraction of those infected develop the disease AIDS, at least during the first few years after exposure. In persons who develop the

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disease, the virus harms the immune system, so that they then develop infections and/or cancer. In addition, the virus can attack the central nervous system directly, causing dementia or other neurological and psychiatric problems.

Recently, researchers have described a possible link of AIDS to drug use. Alcohol, marijuana, nitrites and other drugs of abuse directly suppress the immune system, and use of these drugs may predispose an infected person to develop AIDS.

There is no treatment for AIDS. There are no drugs available anywhere that have been proven to cure it. The Department of Health and Human Services is undertaking an unprecedented effort to test potential new drugs.

Likewise, there is no vaccine against AIDS, but every conceivable approach to the development of one is being explored by the U.S. Public Health Service and other researchers.

#### Public Health and Social Policy Issues

Because of the rapidly growing number of AIDS cases, the central public health concern is the risk of spread to others.

Much has been said about the risks of acquiring AIDS through sexual contact and through sharing of needles in drug use. However, public health authorities have said that there is no evidence that AIDS is communicated through casual contact. Not a single case has been shown to have resulted from exposure to the saliva or tears of someone with AIDS, even though these fluids contain the virus.

But there remain a series of public health and social policy issues with regard to AIDS (and infection with AIDS virus), including:

- o The risks of children attending school with a child who has AIDS;
- o The risks in attending school for a child with AIDS;
- o The risks of a worker who has AIDS, to other workers, to clients or for the worker;
- o The problems in managing detention facilities and prisons which have inmates with AIDS; and
- o The possibilities of restraining persons who can transmit AIDS, including quarantine.

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### AIDS and the Federal Government

In the past four years, the Department of Health and Human Services has been the major focus of AIDS activities in the federal government. Secretary Heckler declared AIDS to be a number one health priority and progressively accelerated the AIDS research effort. Dr. Bowen has committed to continuing it as a priority matter.

This research has yielded extensive information on AIDS and the virus that causes it. A test for AIDS virus antibody has been developed and licensed. Blood banks are using it to screen potential blood donors, to reduce the possibility of transmission of the virus. The Department of Health and Human Services is developing a series of recommendations for reducing the risk of contracting AIDS. While awaiting the development of AIDS drugs and vaccines, major effort is focused on public information and education to reduce the risk of the spread of AIDS.

The Department of Defense has begun testing all potential recruits for AIDS virus antibody, and counselling and excluding from the military those testing positive. Also, the Department of Defense will test all active duty personnel, in a priority order, over the next year. Those who test positive will be evaluated to determine whether they are ill. If so, they may be processed for discharge. If not, they will be retained, but their deployment may be restricted.

On September 11, 1985, the Domestic Policy Council discussed AIDS and had a briefing from Secretary Heckler and her staff. The Attorney General asked the Working Group on Health Policy to serve as a forum for coordinating AIDS activities across the federal government. On November 15, 1985 the Domestic Policy Council heard further reports on AIDS, including the Department of Health and Human Services recommendations for preventing the transmission of AIDS virus infection in the workplace.

Other departments and agencies have the following AIDS activities under consideration:

- o Department of Education -

- Serving as an information resource for state and local education officials.

- o Department of Justice, Bureau of Prisons -

- Isolating inmates with AIDS and AIDS related complex; testing some or all inmates for AIDS virus antibody.

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o Department of State -

Testing personnel, on a voluntary basis, for AIDS virus antibody, with counseling and assignment restrictions for those who test positive.

o Veterans Administration -

Augmenting health resources to care for veterans with AIDS.

The Cost of AIDS to the Federal Government

HHS: To date the major focus of federal government AIDS activities has been the Public Health Service in the Department of Health and Human Services. The PHS resources for AIDS have grown from \$5.5 million in FY 1982 to about \$200 million in FY 1986. Through FY 1985, AIDS funding was distributed among the PHS units as follows: \$133 million for the National Institutes of Health; \$55 million for the Center for Disease Control; \$10 million for the Food and Drug Administration and \$7 million for the Alcohol, Drug Abuse and Mental Health Administration.

An estimated \$20 million in Social Security Administration disability payments will be paid to persons with AIDS during FY 1986.

HHS does not believe that any appreciable Medicare payments are being made on behalf of AIDS patients. An estimated \$50 million in Medicaid payments for AIDS patients were made in FY 1985, and \$100 million is estimated for FY 1986. About one-half of these amounts are federal costs.

DOD: The Department of Defense estimates that FY 1986 AIDS costs will be \$56 million, with \$23 million for screening and testing, \$30 million for medical care and \$3 million for research.

VA: The Veterans Administration estimates that the cost for treating a veteran with AIDS is \$38,000 per year, and that the VA has spent \$22 million on AIDS activities through 1985. The estimate for FY 1986 AIDS costs is \$39 million.

DOJ: The Department of Justice, Bureau of Prisons, estimates that AIDS costs have been \$650,000 through FY 1985, and will be \$1 million in FY 1986.

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State: The Department of State estimates that AIDS costs have been \$28,100 in FY 1985 and will be \$231,500 in FY 1986.

ED: The Department of Education believes that there may be some federal costs due to children with AIDS qualifying for federally funded special education programs, but no specific data are available.

OPM: The Office of Personnel Management estimates that the additional costs of the federal employee health and life insurance and disability retirement programs may be about \$36 million per year due to AIDS.

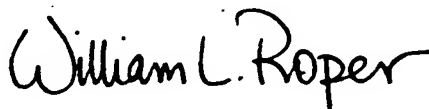
#### Conclusions

- o AIDS is a major epidemic public health threat.
- o The number of AIDS cases will continue to increase.
- o There are long-term hopes for drugs and vaccines against AIDS, but none is immediately at hand.
- o Major effort should focus on prevention, to inform and to lower risks of further transmission of the AIDS virus.

#### Recommendations

The President has acknowledged that AIDS is a major public health problem and has pledged that resources for research and other activities will be used to deal with AIDS as a high priority concern. In keeping with this, the Working Group on Health Policy recommends that the Domestic Policy Council endorse the following steps:

- o Urge federal agencies and state and local governments to take all necessary steps to lessen the risks of spread of AIDS infection, including timely dissemination of accurate information on AIDS.
- o Emphasize that, for the general welfare of society, AIDS must be dealt with as a major public health problem. This could be done through the publication of a special report on AIDS, and enhanced public information efforts.



William L. Roper  
Chairman